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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1016

JACKSON D. LEONARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (Pet. App. A 1a–29a) and its supplemental opinion on petition for rehearing (Pet. App. B 30a–32a) are reported at 524 F. 2d 1076.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1975, and petitioner's petition for rehearing with suggestion for rehearing *en banc* was denied on November 18, 1975 (Pet. App. B 30a). By order dated December 5, 1975, Mr. Justice Marshall extended the time within which to file a petition for a

writ of certiorari to and including January 17, 1976 (Pet. App. H 57a). The petition for a writ of certiorari was filed on January 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that petitioner submitted a false affidavit to an Internal Revenue agent during audit and made a false statement on his 1971 income tax return was properly admissible in his prosecution for filing false income tax returns for 1967 and 1968.

2. Whether *revenue agents* of the Internal Revenue Service, prior to interviewing petitioner in a non-custodial setting, were required to warn him of his rights because of the Service's announced policy that *special agents* give such warnings prior to interviewing persons suspected of possible criminal tax violations.

3. Whether an Internal Revenue Service mail watch designed to identify mail from Swiss banks by examining only the outsides of the envelopes and opening none of the mail violated the Fourth Amendment.

4. Whether the government improperly obstructed petitioner's interviews of prospective witnesses.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of filing false income tax returns understating the amount of his income, in violation of 26 U.S.C. 7206(1). The two

counts respectively charged petitioner with the omission of $24,168 of income from his 1967 tax return and the omission of $58,684 of income from his 1968 return (Pet. App. A 2a). The trial court sentenced petitioner to concurrent terms of 18 months' imprisonment, with 15 months suspended, and he was fined $5,000 on each count and ordered to pay the costs of prosecution (*ibid.*). The court of appeals affirmed (Pet. App. A 1a–29a; Pet. App. B 30a–32a).

In 1968 and 1969, the Internal Revenue Service requested the Postal Service to conduct a surveillance of mail coming into New York City from Switzerland during early 1968 and 1969. This request was made because the New York Regional Office of the Internal Revenue Service had become concerned over possible losses of income taxes through the use of secret Swiss bank accounts (Pet. App. A 10a). The Postal Service agreed, and during those periods a postal inspector and special agents of the Internal Revenue Service photostated by means of high speed copiers the faces of certain air mail envelopes mailed from Switzerland to New York (A. 405a–406a).[1] This procedure was part of what was known as the Foreign Bank Account Project. The result of the work was that the Service selected for audit about 100 persons in New York City (Pet. App. A 10a–11a). Although petitioner was

[1] "A." references followed by a lower case "a" after the page number are to the first 545 pages of Vol. I of petitioner's appendix in the court of appeals. "A." without any lower case "a" following the page number refers to the pages following page 545a, which are numbered as follows: Volume I (pp. 1–142), and Volume II (pp. 143–1029).

one of those persons, the Service had already decided to audit him for other reasons (Pet. App. A 11a).

The evidence in this case showed that in 1967 petitioner, a chemical engineer, entered into a contract with Union Carbide Corporation for engineering services in connection with the construction of two chemical plants (Pet. App. A 3a). Petitioner was to receive two types of fees. The first type consisted of various lump sum payments and later periodic payments. There was no evidence that any of the first type of payment was unreported, and the indictment against petitioner did not so charge (*ibid.*). The second type of payment was a ten percent override on Union Carbide's reimbursements for amounts paid by petitioner to certain subcontractors. Petitioner did not report any of these ten percent overrides as income for 1967 or 1968 (*ibid.*). Petitioner never deposited the checks representing the ten percent overrides ($24,168 in 1967 and $58,684 in 1968) but either cashed them or used them to purchase travelers' checks (Pet. App. A 3a–4a).

During the ensuing audit, the internal revenue agents asked petitioner whether he had any foreign bank accounts. Petitioner replied that he had no foreign bank accounts except for one in an Australian bank which was related to an engineering project in Australia in which he was engaged (Pet. App. A 12a). Petitioner signed an affidavit to that effect, with the further claim that he had not had "any transactions or dealings of any nature with any foreign banks" except

for nominal currency conversions during travel abroad and the Australian project (Pet. App. A 12a and n. 5). In the course of the audit, the agent also asked petitioner to show him his agreement with Union Carbide. Before petitioner exhibited the contract to the agent, he made a "clumsy attempt to delete the 10% override provision from the copy of the contract" (Pet. App. A 5a). The agent thereupon continued his audit and requested additional information from Union Carbide. On the basis of this information, the agent recommended that the matter be referred to the Intelligence Division for a fraud investigation. The recommendation was accepted and a criminal investigation was commenced with a special agent in charge. Thereafter, the agents warned petitioner of his constitutional rights at the beginning of each interview (Pet. App. A 12a–13a).

At trial, an official of Chase Manhattan Bank testified that in 1968, he personally delivered to petitioner a total of $383,000 in official Chase Manhattan checks made payable to petitioner on remittance instructions from the Banque Cantonale de Zurich. Petitioner used most of the checks to pay off a personal bank loan (Pet. App. A 13a).

A second witness, Eva Brooke, testified that in the summer of 1971, petitioner offered her husband an employment arrangement in which half of his compensation would be deposited in a Swiss bank account. During this conversation, petitioner admitted to Eva Brooke that he had a Swiss bank account. The govern-

ment thereupon introduced petitioner's 1971 tax return into evidence in which he stated that he had no foreign bank account during 1971 (Pet. App. A 13a–14a).

ARGUMENT

1. It is unquestioned that petitioner's tax returns for the years at issue were false because they omitted large amounts of income in each of the two years. The only issue before the jury was whether petitioner willfully filed false returns (A. 312a).

Petitioner first argues (Pet. 22–26) that proof of his false statement in his 1971 tax return and in his 1969 affidavit submitted to the revenue agent should not have been admitted into evidence. But these acts were similar to the misconduct charged in the indictment—making false statements on income tax returns—and evidence of those similar acts was admitted only on the issue of willfulness (A. 980–981).

It is well established that evidence of similar crimes is admissible when it is probative with respect to intent, an element in the crime, identity, malice, motive, a system of criminal activity, when the defendant has raised the issue of his character, or when the defendant has testified and the prosecution seeks to impeach his credibility. See *Spencer* v. *Texas,* 385 U.S. 554, 560–561. In criminal tax cases, the general rule is that proof of similar acts is admissible on the issue of willfulness. See, *e.g., United States* v. *Egenberg,* 441 F. 2d 441, 443–444 (C.A. 3); *United States* v. *Jernigan,* 411 F. 2d 471 (C.A. 5); *United States* v. *Taylor,* 305

F. 2d 183 (C.A. 4). In determining whether to admit such evidence, the trial judge is required to consider whether the probative value of the evidence is outweighed by its possible prejudice. *Spencer* v. *Texas, supra,* 385 U.S. at 561; *United States* v. *Deaton,* 381 F. 2d 114, 117 (C.A. 2).

Here, petitioner's willingness to submit a false affidavit to the Internal Revenue Service agent swearing that he had no "transactions or dealings of any nature with any foreign banks" (Pet. App. A 12a, n. 5) and to subscribe to a false statement on his 1971 tax return that he had no foreign bank accounts (when the evidence showed that he admitted to Eva Brooke that year that he did have a Swiss bank account) were relevant to show his general lack of truthfulness in his tax returns and in his statements to the federal tax authorities. While this evidence was probative as to the accuracy of petitioner's sworn statements to the Internal Revenue Service, there was solid evidence that petitioner willfully understated his income on his 1968 and 1969 returns. Thus, contrary to petitioner's claim (Pet. 23) that he was really convicted of having a Swiss bank account rather than on the charges in the indictment, his handling of the Union Carbide override checks (cashing them or converting them into travelers' checks rather than depositing them) as well as his "clumsy attempt" (Pet. App. A 5), to delete the ten percent override provision from the copy of his contract with Union Carbide

which was shown to the investigating agents, was sufficient to support a guilty verdict, wholly apart from the peripheral issue of the Swiss bank account.[2]

There is, moreover, no conflict between the decision below and *United States* v. *Lawrance,* 480 F. 2d 688, 691 n. 6 (C.A. 5), or *Kraft* v. *United States,* 238 F. 2d 794, 802 (C.A. 8). While there are dicta in those cases which suggest that to be admissible similar crime evidence must be "plain, clear and conclusive," the evidence here was sufficient to have enabled the jury to conclude that petitioner did have a Swiss bank account and that he lied to the Internal Revenue Service in swearing that he had no such account.[3] The transaction with the Chase Manhattan Bank checks and the testimony of Eva Brooke established the falsity of petitioner's statements. Although there was no

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[2] *Bronston* v. *United States,* 409 U.S. 352, upon which petitioner relies (Pet. 22), is distinguishable. There, the Court reversed a perjury conviction because the defendant's answers to the prosecutor's questions, while misleading, were all truthful. Here, on the other hand, there was competent testimonial evidence from which the jury could infer that petitioner's affidavit submitted to the revenue agent and his negative answer to the foreign bank account question on his 1971 tax return were both false.

[3] The trial court was convinced that there was a "square conflict" between the representations in petitioner's 1969 affidavit and the other evidence of their falsity, even without considering the effect on that issue of Eva Brooke's testimony as to petitioner's 1971 admission that he had a Swiss bank account (A. 500). Nevertheless, the trial judge fully protected petitioner's rights by giving the jury a limiting instruction on how the evidence of similar acts was to be used, if at all. There was accordingly no departure from the "wide range of discretion" given to the trial court in this matter. *United States* v. *Deaton,* 381 F. 2d 114, 118, n. 3 (C.A. 2).

direct evidence of the existence of the Swiss bank account, that was due to the secret nature of a numbered Swiss account. However, it does not mean that the evidence did not have a plain, clear and convincing character. Thus, while the court of appeals expressed the view (Pet. App. A 23a) that a preponderance of the evidence standard is the correct test for admission of evidence of similar crimes (see *Lego* v. *Twomey*, 404 U.S. 477, 482–487), there is no reason to believe that the evidence of petitioner's similar crimes would not have met the "plain, clear and conclusive" dicta of *Kraft and Lawrance*.[4] Whatever abstract differences of view may exist among the courts of appeals, there is no conflict of decisions "on the same matter" within the meaning of Rule 19(1)(b) of the Rules of this Court.

2. Petitioner further argues (Pet. 14–19) that in failing to warn him of his constitutional rights when they first interviewed him, the revenue agents violated the policy of the Internal Revenue Service, as announced in a press release. In so contending, petitioner

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[4] The situations in *Kraft* and *Lawrance* are distinguishable. *Kraft* involved a mail fraud prosecution and the evidence of similar crimes was letters to the defendant intimating that five years before he had been dilatory in making refunds to customers in a similar business.

In *Lawrance*, a prosecution for selling narcotics in the absence of the appropriate taxpaid stamps in violation of 26 U.S.C. 4704(a), the government sought to introduce evidence of similar narcotics sales by the defendant as relevant to the question of intent. However, the court held that this evidence was inadmissible because the defendant's intent in his prior sales was not an element of the statutory tax crimes for which the defendant was charged.

asserts that the decision below conflicts with *United States* v. *Leahey*, 434 F. 2d 7 (C.A. 1); *United States* v. *Heffner*, 420 F. 2d 809 (C.A. 4); and *United States* v. *Sourapas*, 515 F. 2d 295 (C.A. 9). Those cases are distinguishable for they hold that when *special agents* fail to give the warnings prescribed by the procedures of the Internal Revenue Service, statements obtained from the taxpayer must be suppressed on due process grounds. Here, however, the agents in question were revenue agents whose function is to conduct civil tax audits and not criminal investigations. Accordingly, the court of appeals (Pet. App. A 20a) correctly found it unnecessary to reach the question whether it would follow those cases.[5] Since petitioner was given warnings of his constitutional rights when his case was referred for criminal investigation to special agents of the Intelligence Division, procedures of the Internal Revenue Service were not violated.

There is no basis for petitioner's argument (Pet. 14–19) that the investigation of his tax liability was criminal in nature from its inception because the relevant postal regulations contemplate that the mail cover is necessary to obtain information "regarding the commission or attempted commission of a crime" (Pet. 15; Pet. App. E 36a). Petitioner argues here, as

[5] Thus, as petitioner concedes (Pet. 2n., 19n.), the question presented in *Beckwith* v. *United States*, No. 74–1243, argued December 1, 1975, as to whether a special agent investigating possible criminal tax violations must give a taxpayer *Miranda* warnings prior to interviewing him, is likewise not involved in this case.

he did in the court below, that unless the purpose of the mail cover was to unearth crime it was illegal under the postal regulations, and that if it was legal, the tax investigation was criminal and the revenue agents should have warned him of his constitutional rights. But the court of appeals did not find itself "pinioned between the horns of [this] dilemma," stating (Pet. App. A 21a):

> The mail cover came within the Postal Regulations because IRS had reason to believe that crimes under the revenue laws were being committed by some taxpayers through the use of Swiss bank accounts. It does not follow that every person whose name turned up in the print-out as probably having a Swiss bank account was suspected of committing such a crime. In fact the audit disclosed no sufficient evidence that Leonard had committed a crime by having a Swiss bank account. What ultimately led Agent Laski to recommend a criminal investigation was the data furnished by UCC, which showed, not a "kick-back" as represented by the informer, but a failure to report the 10% overrides which Leonard had received.

3. Petitioner further contends (Pet. 19–22) that the Swiss mail watch conducted by the Postal Service at the request of the Internal Revenue Service was illegal and therefore its fruits should have been suppressed. Although the Fourth Amendment may prohibit a warrantless opening of sealed letters and packages (*Ex parte Jackson,* 96 U.S. 727), there was no

such opening here.[6] All that was done was to photocopy the outside of certain envelopes.[7] As the court of appeals pointed out, "The IRS was confronted with a serious problem in the use of Swiss bank accounts to evade the revenue laws" (Pet. App. A 15a), and even if copying the outside of envelopes may be considered a search, here it was not an unreasonable one for there could be no reasonable expectation of privacy with respect to the outsides of envelopes in the stream of international mail, "which are subject to inspection and even in some cases to opening in aid of the enforcement of the customs laws" (Pet. App. A 16a).[8]

4. Petitioner also claims (Pet. 26–29) that the government improperly obstructed his interviews of prospective witnesses, particularly agents of the Internal Revenue Service, by directing them not to answer some of petitioner's questions. However, the district court was correct in refusing to order, as petitioner

[6] Petitioner's statement that the special agents "intercepted, inspected and photocopied mail * * *" (Pet. 6) may tend to create the impression that some of the mail was opened. In fact, no mail was opened and the photocopying was limited to the faces of the envelopes (A. 375a–376a).

[7] The photocopying did not cause the slightest delay in delivering any person's mail (A. 423a).

[8] Petitioner also argues (Pet. 20) that mail watches must necessarily be limited to specific individuals who were suspected of having committed crimes. But, as the court of appeals correctly pointed out, there is no reason to read the postal regulations so narrowly, nor did the Postal Service do so "and its interpretation of its internal regulations is entitled to weight. See 4 Davis, *Administrative Law Treatise*, Sec. 30.12 at 261 & n. 12 (1958)" (Pet. App. A 16a–17a).

requested, either the prosecutor's total exclusion from petitioner's deposition of the agents or otherwise to direct that the prosecutor not instruct and advise those witnesses "what questions to answer and not to answer" (A. 302a). Investigative agents of the government are in effect part of the prosecution team and they are not required to submit to pretrial interview and examination by counsel for the defense. A defendant's pretrial rights to discovery are governed by Rule 16 of the Federal Rules of Criminal Procedure, which makes no such provision. Where, as here, seven government agents have submitted to such pretrial questioning by defense counsel and provided substantial information not otherwise producible before trial under the rules, petitioner obtained far more information than contemplated by the rules of criminal discovery. At all events, as the court of appeals observed (Pet. App. A 28a), petitioner was not prejudiced in the slightest degree by the infrequent interventions of the prosecutor at these interviews.[9]

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[9] Petitioner also contends (Pet. 29–32) that the government improperly used a Letter Rogatory to obtain the presence of Eva Brooke, a British citizen, at the trial. The court of appeals answered this argument in the following terms, upon which we rely (Pet. App. A 29a):

"Counsel makes a variety of attacks, unnecessary to detail, on the methods by which the prosecution secured the presence of Mrs. Brooke. Apart from the fact that it is not clear that these objections were raised below and that they are of doubtful merit, the short answer is that impropriety in the method by which the prosecution has obtained the attendance of a witness, while a proper subject for cross-examination or proof insofar as the impropriety may go to the weight of the witness' testimony, is not of itself a ground for reversal."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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